MOTION FILED

DEC 20 1973

LIBRARY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Petitioners*,

v.

LLOYD F. EARLY, *Respondent*.

On Petition for Writ of Certiorari to the Seventeenth Judicial Circuit Court, Broward County, Florida

MOTION OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006
202/298-6161
Attorneys for The American Newspaper Publishers Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Petitioners*,

v.

LLOYD F. EARLY, *Respondent*.

On Petition for Writ of Certiorari to the Seventeenth Judicial Circuit Court, Broward County, Florida

---

MOTION OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the American Newspaper Publishers Association (hereafter "ANPA"), by its counsel, and moves this Honorable Court for leave to file brief *amicus curiae* in support of the petitioners herein on the following grounds:

1. The ANPA is a non-profit organization organized and existing under the laws of the Commonwealth of Virginia. Its member newspapers comprise more than

ninety percent of the daily and Sunday circulation of newspapers within the United States.

2. The filing of such a brief has been consented to by the petitioners and, although the Respondent has been requested to consent to the filing of such a brief, he has refused.

3. The ANPA desires an opportunity to state to this Court the position of the majority of its members on the substantial First Amendment question presented to this Court by the petitioners. Although the orders of the Court below in this case would appear at first glance to relate only to interlocutory matters of discovery, concealed in those orders is a threat to petitioners' free and unfettered exercise of their fundamental right to publish comment on matters of public concern in a spirited and uninhibited manner. If the discovery orders in the Court below are allowed to remain standing, they will set a precedent which will have serious impact upon all members of the ANPA in the free and unfettered exercise of their First Amendment rights.

WHEREFORE, the ANPA respectfully urges that its motion for leave to file brief *amicus curiae* in support of the petition be granted.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006
202/298-6161
Attorneys for The American Newspaper Publishers Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-751

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY E. FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Petitioners*,

v.

LLOYD F. EARLY, *Respondent*.

On Petition for Writ of Certiorari to the Seventeenth Judicial Circuit Court, Broward County, Florida

---

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Newspaper Publishers Association (hereafter "ANPA") submits this brief as *amicus curiae* in support of petitioners' petition for a writ of certiorari to the Seventeenth Judicial Circuit Court,

Broward County, Florida. Although your *amicus* obtained consent to the filing of this brief from petitioners, it was denied such consent by respondent. Accordingly, a motion for leave to file this brief is submitted to this Court herewith.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of approximately 1100 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. In addition to the three newspapers published by the Palm Beach Newspapers, Inc., there are twenty-three other ANPA newspaper members located throughout the State of Florida.

If a libel plaintiff, by setting forth allegedly libelous statements taken from the newspaper defendant's pages and then merely alleging actual malice, may compel a newspaper to divulge its most private financial data, including its income tax returns, with the possibility that such information may become known to the public in general and, more specifically, to that newspaper's competitors, your *amicus* submits that its newspaper members' editorial enthusiasm must surely be intimidated by such unconstitutional exposure. The effect of the orders of the Court below, although subtle, are clearly unconstitutional and violate the petitioners' and other publishers' First Amendment guarantee of freedom of the press.

ARGUMENT

Your *amicus* will not here set forth a recital of the procedural background giving rise to the instant petition. Those facts are amply set forth by the parties in their briefs. Suffice it to say, however, that the clear First Amendment question presented by the petition goes to the heart of the guarantee of a free press.

The merits of the case brought below by respondent are governed by *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), in that respondent, plaintiff below, must show that the alleged libelous publications were false and that they were made with actual malice as defined in that case. However, the offending orders promulgated by the Court below require the petitioners to come forward with the most private of financial detail having to do with the operation of their press upon unsupported allegations of actual malice. It appears clear to your *amicus* tha the requirement that this highly private and perhaps competitive information be revealed on mere allegations constitutes that type of unconstitutional restraint upon the press that this Court has struck down many times before in its vigilant protection of the press. Extensive argument does not appear necessary to show that the mere specter of a libel action in which this type of information might have to be revealed has a most certainly intimidating effect on

> "* * * the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times, supra,* at page 266 quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

In *New York Times,* this Court made it abundantly clear that the very essence of a free press is its ability to comment vigorously and antagonistically, particularly in the field of political activity, and this Court in that case gave protection to that type of comment even though it may have been false if uttered in good faith. It obviously appeared to this Court that it would be better for perhaps provocatively false comment to be published than to restrain vigorous public debate in the press.

What we suggest to the Court in this case is a logical and necessary extension of the doctrine of *New York Times.* That case teaches that, in order to recover in a libel action against a newspaper, actual malice must be shown and that it must be shown with the convincing clarity which the constitutional standard demands. We suggest that this Court extend the doctrine of *New York Times* and, indeed, *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971), by requiring a libel plaintiff bringing an action against a newspaper to show a *prima facie* case of actual malice before such plaintiff be permitted to discover any financial information concerning the operation of a newspaper. Although your *amicus* does not presume to advise this Court how that procedure should be utilized in assuring this First Amendment safeguard, certainly a reasonable possibility would be to require the plaintiff to make a pre-discovery showing to the court by oral testimony and/or documentary evidence or by a written proffer of testimony certified by counsel for the Court's determination as to whether or not plaintiff will, at trial, reasonably be anticipated to make a *prima facie* case of actual malice with evidence of the required convincing clarity.

This additional procedural requirement on a libel plaintiff, although indeed burdensome, must certainly be justified by the safeguard it would afford to the press.

Finally, although the great concern of the Amicus relates to the First Amendment issue which is the heart of the Petition, it appears that the extent of the discovery permitted by the court below is clearly excessive and totally unnecessary. The District Court of Appeal, First District, State of Florida and the Supreme Court of Florida have correctly laid down the rule that evidence of "financial worth" of a defendant may be discovered in the case where punitive damages are allowable. *Spencer Ladd's, Inc.* v. *Lehman, et al.,* 167 So. 2d 731 (1964), 182 So. 2d 402 (1965). That same Florida District Court of Appeal, however, recently held in the case of *Tallahassee Democrat, Inc.* v. *Tom Pogue,* 280 So. 2d 512 (1973), that a profit and loss statement and income tax returns do not necessarily portray a true picture of "financial worth" and quashed an order of the Florida circuit court which had ordered the newspaper to produce tax returns and a profit and loss statement. In quashing the order, the Court said that a properly authenticated financial statement satisfies the requirement for the production of evidence of "financial worth." The Petitioners here have met that requirement and should not be required to produce further financial information.

Your *amicus* fully endorses and supports the arguments made in this Court by the Petitioners and, for the reasons stated herein and in the Petition, respectfully urges that this Court issue the requested Writ of

Certiorari to the Seventeenth Judicial Circuit Court, Broward County, State of Florida.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006
202/298-6161
Attorneys for The American Newspaper Publishers Association